INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Argument	5
Conclusion	7

CITATIONS

Cases:

Allen v. *United States*, 164 U.S. 492	7
Holland v. *United States*, 348 U.S. 121	5, 6
Sugarman v. *United States*, 249 U.S. 182	7

Statute:

26 U.S.C. (1952 ed., Supp. V) 5213(a)	2

602343—61

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 193

VERLIN BAXTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 271–272; Pet. A2–A3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1961 (R. 270; Pet. A1). Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to July 3, 1961, and the petition was filed on June 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction of having willfully failed to report sales of sugar.

2. Whether various rulings by the district court at the trial were proper.

STATUTE INVOLVED

26 U.S.C. (1952 ed., Supp. V) 5213(a) provided in pertinent part:

> Every person disposing of any substance of the character used in the manufacture of distilled spirits shall, when required by the Secretary or his delegate, render a correct return, in such form and manner as the Secretary or his delegate may by regulations prescribe, showing the names and addresses of the persons to whom such disposition was made, with such details, as to the quantity so disposed of or other information which the Secretary or his delegate may require as to each such disposition, as will enable the Secretary or his delegate to determine whether all taxes due with respect to any distilled spirits manufactured from such substance have been paid. * * *

STATEMENT

A four-count indictment returned in the United States District Court for the Eastern District of Tennessee charged petitioner with having willfully failed to report to the Internal Revenue Service his dispositions of large quantities of sugar, an ingredient in the manufacture of distilled spirits, in violation of 26 U.S.C. (1952 ed., Supp. V) 5213(a), *supra* (R. 4–7). Following a trial by jury, petitioner was convicted on count two, and was sentenced to six months' imprisonment (R. 8–9, 263).[1] On appeal, the conviction was

[1] The trial court dismissed the fourth count, and the jury found the petitioner not guilty on counts one and three (R. 230–231, 263).

unanimously affirmed (R. 270, 271–272; Pet. A1, A2–A3).

The evidence relating to the second count may be summarized as follows:

Petitioner and his wife owned and operated a small country grocery store in Sevier County, Tennessee. From June 7, 1957, through April 24, 1959, petitioner purchased 53,820 pounds of sugar from a wholesale grocery company in Maryville, Tennessee, and from June 10, 1957, through March 19, 1959, he purchased 40,970 pounds of sugar from a grocery company in Newport, Tennessee (R. 45–46, 48–50).

On June 7, 1957, agents of the Alcohol Tax Unit (A.T.U.) served a demand letter on petitioner which required him to report to the Alcohol and Tobacco Tax Division of the Internal Revenue Service all dispositions of sugar in the amount of 25 pounds or more (R. 23–27). The letter was explained to petitioner, and blank forms, which were explained "item by item", were left with the petitioner (R. 26–27, 30, 37). Petitioner refused to sign a receipt for the demand letter and said that he would not sell over twenty-four pounds of sugar (to any one person) (R. 26, 35). Petitioner never filed any reports regarding his dispositions of sugar (R. 31–32).

On May 7, 1958, the Alcohol and Tobacco Tax Division sent a registered letter to petitioner which called his attention both to the requirement that he submit returns for his dispositions of sugar and to the penalty for his failure to do so (R. 52–54). In his reply, petitioner stated that he had not sold over twenty pounds of sugar to any one person and that he did not know how to fill out the forms (R. 55–56).

On the afternoon of May 27, 1958, the date charged in the count on which petitioner was convicted, A.T.U. Agent Roy Tubb, who had taken up an observation position near petitioner's store, saw one Carroll Williamson and petitioner remove from an automobile two burner tubes of the type commonly used to fire stills and carry them to the storeroom of petitioner's store (R. 73, 74–76). The petitioner, Williamson, and another man, Jenkins, then loaded three bales marked "Dixie Crystal" and a 50-pound bag of "Jersey Cream Feed"[2] into the trunk of the automobile and Williamson and Jenkins drove off (R. 76). Later that afternoon, the burner tubes and a quantity of fuel oil were loaded into another car and driven away (R. 77). Petitioner himself testified that he bought "Dixie Crystal" sugar from the Taylor Grocery (R. 199).

On September 8, 1958, in petitioner's storeroom, the agents counted forty 60-pound bales of "Godchaux" and "Dixie Crystal" sugar, together with twelve 25-pound bags of sugar. They also saw approximately 60 cases of isopropyl alcohol, 300 cases of half-gallon fruit jars, several 50-pound bags of bran and some meal and flour (R. 77, 80–81, 129–130).[3]

[2] "Jersey Cream Feed", the chief ingredient of which is wheat bran, is used in the distillation of mash (R. 73; see R. 83).

[3] Isopropyl alcohol is used as an additive to increase the proof of "moonshine whiskey" (R. 81–82). Bran is also used in the manufacture of whiskey, and the half-gallon fruit jars constituted "about the only thing used as containers for the moonshine whiskey" in the Cosby section of Tennessee (R. 66, 72–73). Petitioner's store is located about five miles from Cosby, Tennessee (R. 86).

ARGUMENT

1. Petitioner's attack on the sufficiency of the evidence is without merit and raises no question warranting review by this Court. Although the agent could not positively state that the substance he saw being loaded from petitioner's storeroom on May 27 was sugar since he did not open the bales, the jury could reasonably infer that the bales marked "Dixie Crystal" were sugar, because "Dixie Crystal" was a brand which petitioner admittedly had purchased, and other quantities of sugar bearing the same brand name were located in petitioner's storeroom. Accord, *Holland* v. *United States*, 348 U.S. 121, 139–140.

2. Petitioner's attack on various rulings at the trial is also without merit.

a. Contrary to petitioner's contentions (see Pet. 6–9), the trial court properly admitted testimony concerning petitioner's possession and disposition of half-gallon fruit jars, isopropyl alcohol, fuel oil, burner tubes and bran. Proof with respect to these items, which were suitable for the manufacture of whiskey (R. 66, 72–73, 74–76, 81–82, 86), was relevant to the issue of petitioner's intent and willfulness in failing to submit the required reports.

b. After the jury had deliberated for some time, a juror asked the court whether the jury had "to be absolutely sure that * * * sugar [was] in that sack" (R. 250). The court then charged the jury that in order to convict petitioner on the various counts they had to find that he had disposed of sugar in excess of twenty-five pounds and that he willfully had failed to make the required reports (R. 250–252, 255). The

court further charged that the jury would have to find petitioner not guilty if it had a reasonable doubt that petitioner had not disposed of sugar in excess of twenty-five pounds (R. 250–252). In response to a request, the court repeated its charge on circumstantial evidence (R. 252–253) and said (R. 253) that "[i]t all comes back to the question of reasonable doubt." The court also charged that the circumstances relied on "must point so unerringly to the guilt of the accused as to exclude every other reasonable hypothesis except that of guilt" (R. 254).[4] Thus, the court did not commit error in denying petitioner's request that the court instruct the jury that it could not convict unless it found beyond a reasonable doubt that sugar was contained in the bales (R. 256, 266), because the court had already embodied in its charge the substance of petitioner's request. Accord, *Sugarman* v. *United States,* 249 U.S. 182, 185.

c. Finally, it was entirely proper for the court, after being apprised by the jury that it could not agree on a verdict, to charge the jury that absolute certainty cannot be reached in a large number of cases; that the jury should try to decide the case if it could conscientiously do so; that the jurors should not give up their good faith convictions about the case; and that the jurors should re-evaluate their positions in the light of the views of other jurors (R. 258–259). See *Allen* v. *United States,* 164 U.S. 492, 501.

---

[4] This portion of the charge went beyond what was required to protect petitioner's rights. See *Holland* v. *United States, supra*, 348 U.S. at 139–140.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solictor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

JULY 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961